



January 17, 2019

Lawrence J. Goldzband, Executive Director
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Commissioners and Alternates
San Francisco Bay Conservation and Development Commission
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**COMMENTS IN RESPONSE TO JANUARY 17, 2019 COMMISSION MEETING
AGENDA, ITEMS 8 AND 9 (BAY PLAN AMENDMENT Nos. 1-19 AND 2-19) AND
ITEM 10 (COMMISSION CONSIDERATION OF A CONTRACT WITH THE
OAKLAND ATHLETICS TO CONSIDER REMOVAL OF THE BAY PLAN AND
SEAPORT PLAN PORT PRIORITY USE AREA DESIGNATION FROM HOWARD
TERMINAL)**

Dear Director Goldzband, Commissioners and Alternates,

These comments are submitted on behalf of Schnitzer Steel Industries, Inc. (Schnitzer Steel) & Pacific Merchants Shipping Association (PMSA) in response to the Tentative Agenda for the January 17, 2019 Commission Meeting and incorporated January 4, 2019 Staff Reports for proposed amendments to the San Francisco Bay Plan ("Bay Plan") and San Francisco Bay Area Seaport Plan ("Seaport Plan"), including deletion of the port priority use area designation from Howard Terminal in Oakland to facilitate the Oakland Athletics' proposal for a new major league baseball park and mixed-use development (the "Project") on and near the Howard Terminal site in the Port of Oakland.

The signatories to this letter will be directly affected by the proposed project. For example, Schnitzer Steel owns and operates a heavy industrial 26.5-acre metals recycling yard and marine terminal at 1101 Embarcadero West adjacent to the Howard Terminal site.¹ PMSA represents

¹ Schnitzer Steel opened the metals recycling facility and deep-water port in 1965, and in 2006 completed installation of a mega-shredder to meet increasing demand for recycled metal. Schnitzer Steel purchases scrap metal in North America, processing it for reuse and selling it to steel mills and foundries globally. The Oakland facility is close to efficient rail, truck, and critical marine transportation networks. By recycling scrap metal, the company diverts and reuses millions of tons of materials each year that might otherwise be destined for landfills. In addition, processed metal is utilized to manufacture new metal-based products, conserving natural resources and significantly reducing greenhouse gas emissions.

ocean carriers, marine terminal operators, and various other maritime interests which conduct business on the U.S. West Coast, including at the Port of Oakland. All of the Port of Oakland's current Marine Terminal Operator tenants, as well as the overwhelming majority of the ocean carriers calling at these terminals, are members of and represented by PMSA.

The current Bay Plan and Seaport Plan designate "water-related industry," including that operated by Schnitzer Steel, as a priority use for the port, including the Howard Terminal site. The signatories to this letter and members of the public are very concerned that any amendments to the Bay Plan and Seaport Plan must continue to prioritize port property for water-related industry in order to protect the maritime economy, to protect the Bay from development that could lead to increased fill, and to account for Public Trust issues.

We believe there must be thorough and balanced planning in the Bay and Port of Oakland, and in particular a meaningful environmental review of the Bay Plan amendments and the proposed Project and all associated actions. We submit that the Commission's allotted planning and environmental review process – with time for environmental assessment from "mid-2019" to a meeting date on December 5, 2019 with documentation published 30 days in advance – appears inappropriately hurried as a means to expedite the Applicant's proposed baseball stadium. Environmental assessment under the Commission's California Environmental Quality Act-equivalent program (Public Resources Code Section 21000, et seq.) ("CEQA") of a project of this magnitude with potentially far-reaching significant impacts – including traffic and transportation, land use conflicts, degradation of air and water quality, and others – should not be rushed and instead should be reasoned, considered, and with full disclosure to the public and affected parties from the outset.

Agenda Item 8: Proposed Brief Descriptive Notice for Possible Bay Plan Amendment No. 1-19 to Review and Possibly Revise Bay Plan and Seaport Plan Port Findings, Policies and Designations and Proposed Public Hearing on December 5, 2019

The proposed Descriptive Notice states the proposed amendment would "involve a thorough review and possible revision of the Plans' Port Findings, Policies, and Designations." Notice at 1.² The attached Staff Report elaborates that the Commission is seeking a forecast of the volume of different cargo types that are expected to be handled at Bay Area Ports to update the plan forecast that expires in 2020 and other "background information," including the potential effects of rising sea level on the Ports. Staff Report at 1-2. In turn, the updated forecast and information may affect the Commission's port designations and be used to respond to future amendment requests. *Id.* Formal applications for land use changes at Bay Area Ports (such as that proposed here by the Applicant) would be processed with this amendment. Staff Report at 2.

The signatories to this letter welcome the opportunity to develop and provide technical detail regarding the volume and nature of cargo handled at the Port facilities. As noted above, global demand for metal processed at Schnitzer's facility has been increasing and the deep-water port is an important link in the company's global transportation network. Water-related industry at the

² <http://www.bcdc.ca.gov/cm/2019/0117DescNoticeBPA1-19.pdf>

Port of Oakland and throughout the Bay Area should retain priority-use designation and be protected from inroads, such as the change in priority use designation at Howard Terminal proposed by the Applicant.

Protections for Water-Related Industry

The McAteer-Petris Act (Gov. Code §§ 66650, *et seq.*) (“MPA”) declared the Legislative intent that “certain water-oriented land uses along the bay shoreline are essential to the public welfare of the bay area,” and that these uses include ports and “water-related industries.” Gov. Code § 66602.³ Thus, the MPA requires that the “San Francisco Bay Plan should make provision for adequate and suitable locations for all these uses, thereby minimizing the necessity for future bay fill to create new sites for these uses.” *Id.*

The Bay Plan defines water-related industries as those that “require a waterfront location on navigable, deep water to receive raw materials and distribute finished products by ship, thereby gaining a significant transportation cost advantage.” Bay Plan, Water-Related Industry, Findings(a).⁴ Further, the “navigable, deep water sites around the Bay are a unique and limited resource and should be protected for uses requiring deep draft ship terminals, such as water-related industries and ports,” in particular because “waterfrontage with access to navigable, deep water is scarce in the Bay Area” and many other industries compete with water-related industries for waterfront sites. *Id.*, Findings (b) – (c). Bay Plan Policies for water-related industry include the following:

1. Sites designated for both water-related industry and port uses in the Bay Plan should be reserved for those industries and port uses that require navigable, deep water for receiving materials or shipping products by water in order to gain a significant transportation cost advantage.
2. Linked industries, water-using industries, and industries which gain only limited economic benefits by fronting on navigable water, should be located in adjacent upland areas . . .
3. Land reserved for both water-related industry and port use will be developed over a period of years. Other uses may be allowed in the interim that, by their cost and duration, would not preempt future use of the site for water-related industry or port use.
4. Water-related industry and port sites should be planned [so that] . . .

. . .

³ All further statutory references are to the Government Code unless otherwise noted.

⁴ http://www.bcdc.ca.gov/plans/sfbay_plan#20

- d. Any new highways, railroads, or rapid transit lines in existing or future water-related industrial and port areas should be located sufficiently far away from the waterfront so as not to interfere with industrial use of the waterfront. New access roads to waterfront industrial and port areas should be approximately at right angles to the shoreline, topography permitting.⁵

The Seaport Plan port priority use area designation also is “intended, in part, to preserve adequate upland areas for port uses” and thus “help minimize the need for additional Bay fill.” Staff Report at 1. Although the Staff Report notes that the Bay Plan cargo forecast has not been updated, the Seaport Plan (as recently amended in January 2012) recognizes (for example) the continuing increase in scrap metal exports at Schnitzer Steel via shipping:

“The shift to container shipping of goods will likely increase in the future. Recycling of materials, such as steel scrap and cement, has increased because of state laws requiring local governments to reduce the volume of materials going to landfills, and because of growth in the overseas market for scrap iron and steel. Scrap metal exports are growing at Schnitzer Steel.” (Seaport Plan at 6.)

The Seaport Plan further states the need to maintain operations at Schnitzer Steel:

“Schnitzer Steel is an active, privately-owned, dry bulk marine terminal used for recycling and exporting scrap steel. Because the site is located on the Inner Harbor Channel within the Port of Oakland, it could be developed into a two-berth container terminal if and when not needed for its present use.” (*Id.* at 24, emphasis added.)

“Schnitzer Steel is and should remain designated as an active dry bulk terminal as long as the facility is used for this purpose. At such time as the site is no longer needed for recycling scrap steel or other bulk shipping operations, it should first be considered for conversion to a container terminal.” (*Id.* at 26, emphasis added.)⁶

We submit that the Bay and Seaport Plans’ water-related industrial Findings, Policies, and Priority Use Areas should not be amended in any way that would undermine the importance and priority of water-related industries. Indeed, any such amendment would be contrary to the MPA and would unnecessarily interfere with established water-related industrial operations, including the Schnitzer Steel metals recycling facility and deep-water port opened in 1965 and constituting a protected use under Section 66654.⁷

⁵ http://www.bcdc.ca.gov/plans/sfbay_plan#20

⁶ <http://www.bcdc.ca.gov/seaport/seaport.pdf>

⁷ “Within the area of the commission’s jurisdiction under subdivisions (b), (c) and (d) of Section 66610, any uses which are in existence on the effective date of this section may be continued, provided, that no

Standards for Plan Amendment

As stated in the Staff Report, to “consider removing a port priority use area designation, the Commission must evaluate the impact of the deletion on the region’s capacity to handle the total amount of ocean-going cargo projected to pass through the Bay Area ports. Therefore, to approve a designation change, the Commission must determine that eliminating a potential future use of an area for port purposes will not negatively affect the region’s overall cargo handling capacity and will not increase the need to fill the Bay for future port development.” Staff Report at 2.⁸ That is only part of the analysis. The Commission may change the boundaries of water-oriented priority land uses only in the manner provided in Section 66652 and BCDC regulations. § 66611 (Bay Plan maps); § 66651. Any change “shall be consistent with the findings and declarations of policy” contained in the MPA. § 66652.⁹ We also note that changes to a policy or standard require the affirmative vote of two-thirds of the Commission members, which is consistent with the significant nature of such amendments. *Id.*; *see also* Bay Plan, Applying and Amending the Bay Plan (same).

As discussed above, removal of the water-related industrial priority use designation for the Howard Terminal is inconsistent with the MPA. § 66602 (water-related industries essential to public welfare and the Bay Plan “should make provision for adequate and suitable locations for all these uses” and avoid necessity of creating new sites for such uses). Amendments to the Seaport Plan must also be consistent with the Metropolitan Transportation Commission (“MTC”) rules for amending the Regional Transportation Plan, and proposed amendments should be reviewed first by the Seaport Planning Advisory Committee. The overall purpose of the Seaport Plan is to ensure “the continuation of the San Francisco Bay port system as a major world port and contributor to the economic vitality of the San Francisco Bay region,” to maintain or improve environmental quality of the Bay and its environs, to efficiently use and operate marine terminals, to provide integrated and improved surface transportation, and to reserve “sufficient shoreline areas to accommodate future growth in maritime cargo, thereby minimizing the need

substantial change shall be made in such uses except in accordance with this title.” § 66654 (Added by Stats. 1969, Ch. 713).

⁸ The Staff Report appears to focus on one of several inquiries: “Deletions of the port priority use and marine terminal designations from this plan should not occur unless the person or organization requesting the deletion can demonstrate to the satisfaction of the Seaport Planning Advisory Committee that the deletion does not detract from the regional capability to meet the projected growth in cargo. Requests for deletions of port priority or marine terminal designations should include a justification for the proposed deletion, and should demonstrate that the cargo forecast can be met with existing terminals.” Seaport Plan at 7. That fact tends to highlight the nature of the proposed amendments to expedite the Oakland proposed baseball stadium project. Individual projects are evaluated as to their effect on the entire Bay (Section 66601), however, that is not a limitation on Commission evaluation.

⁹ A Commission approval resolution must contain specific findings of fact to support the legal conclusion that the amendment conforms to all relevant policies of the MPA Sections 66600 through 66661. 14 Cal. Code Regs. § 11006.

for new Bay fill for port development.” Seaport Plan at 1. Land use designations and policies are employed to achieve those goals. *Id.* Port priority use areas are reserved for port-related and other uses that will “not impede development of the sites for port purposes.” *Id.* Within those areas, marine terminals are reserved for cargo handling operations. *Id.* Growth in waterborne cargo can be accommodated by constructing new marine terminals – which requires some fill and dredging—or increasing the rate and volume of cargo moved through existing marine terminals. *Id.* at 2.

Here, removing the priority use designation from Howard Terminal moves farther away from achieving each of the Plan’s goals. As noted in the Seaport Plan, ports require a “flat, expansive waterfront location on navigable, deep water channels with excellent ground transportation access and services.” *Id.* at 8, Findings. Such sites in the Bay Area “are limited, and are a regional economic resource that should be protected and reserved for port priority uses, such as marine terminals and directly related ancillary activities . . .” *Id.* Development of Howard Terminal as proposed by the Oakland Athletics would preempt future water-related industry, port or marine terminal use, thereby increasing the possibility of future construction of new marine terminals and generally requiring at least some Bay fill. Nor does the proposal qualify as the type of “small-scale commercial recreational establishment” that could provide a public benefit “until such time as the area is developed as a marine terminal.” *Id.* at 9. Instead, it would impair existing or future use of the area for port purposes, contrary to Seaport Plan policies.

In addition to the inconsistencies described herein, the Amendments are not consistent with applicable local plans, policies, and zoning. Indeed, the Applicant has had to seek planning amendments from the City of Oakland on a similarly-truncated environmental review schedule. Respectfully, environmental and planning review of the proposed Amendments should not be short-circuited.

Environmental Assessment and Analysis

The Commission should allow sufficient time for thorough analysis and consideration of environmental issues. The proposed time for environmental assessment from “mid-2019” to a meeting date on December 5, 2019, with documentation published 30 days in advance, is unnecessarily truncated. Staff Report at 2. For example, the Commission approved the smaller, discrete Pier 39 aquarium project after a review “lasting over 30 months and involving 12 public hearings.” *Save San Francisco Bay Assn. v. San Francisco Bay Conservation and Development Com.* (1992) 10 Cal.App.4th 908, 918.

The Commission must consider the potential environmental impacts of the proposed Bay Plan and Seaport Plan amendments under its certified regulatory program, including far-ranging impacts related to traffic and transportation, land use, hazardous materials, and air and water quality. While BCDC itself is not required to prepare an Environmental Impact Report (“EIR”) under CEQA, under its certified “functionally equivalent” program the Commission is required to conduct substantive environmental review of proposed actions having a significant effect on the environment. When BCDC is lead agency and the Executive Director has determined that a

proposed activity may have an individually or cumulatively substantial adverse impact on the environment, the Commission must prepare an Environmental Assessment (“EA”), which is the process to be followed here. 14 Cal. Code Regs. § 11511(c). The EA must include, among other things, all substantial adverse environmental impacts that the Project may cause; any feasible mitigation measures that would reduce those impacts; any feasible alternatives to the Project that would reduce substantial adverse environmental impacts; and “other information that the Executive Director believes appropriate.” 14 Cal. Code Regs. § 11521; *see also* 14 Cal. Code Regs. § 11003. The Staff Report must also include “a summary of and responses to all significant environmental points raised up to the time the staff planning report is mailed.” *Id.*

These regulations make clear that when determining whether to approve Plan amendments, the Commission must allow sufficient time to thoroughly consider potential environmental impacts and cumulative impacts caused by the proposed amendments. The Descriptive Notice generally describes potential amendments to Plan Findings, Policies and Designations, which could result in significant changes and far-ranging significant adverse environmental impacts. Indeed, in light of the scope of the proposal that the amendments would facilitate—a mixed-use Project featuring a 35,000-person capacity stadium, thousands of residential units, over 2 million square feet of mixed-use development, a 3,500-capacity performance venue, hotel, possible modifications to an existing power plant, and other elements—potential impacts of the Project would be substantial if not unmitigable. The Commission should carefully analyze all potentially significant impacts. Of course, the Commission should also consider waiting for the full-blown EIR that the City of Oakland has committed to prepare for its planning and zoning amendments.

Violation of Public Trust Doctrine

Amendments to the existing Plans’ policies and priority use designations—such as removing the priority use designation at Howard Terminal to facilitate a large mixed-use project—would impair traditional Public Trust uses at port locations such as navigation and water-based commerce.

The Bay Plan’s Public Trust policies require that when BCDC takes any action affecting lands subject to the public trust, “it should assure that the action is consistent with the public trust needs for the area.” Bay Plan, Public Trust Policy. “The purpose of the public trust is to assure that the lands to which it pertains are kept for trust uses, such as commerce, navigation, fisheries, wildlife habitat, recreation, and open space.” *Id.*, Public Trust Findings (d).

Under California’s Public Trust doctrine, the State is required to hold title to all submerged lands beneath navigable waters in trust for the people of the State for the traditional purposes of commerce, navigation and fisheries. *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 434; Cal. Civ. Code § 670.¹⁰ Permitted Public Trust uses include purely commercial

¹⁰ Accordingly, the State may not alienate Public Trust lands, such as through sale to private parties. *City of Berkeley v. Superior Court* (1980) 26 Cal.3d 515, 537; *see also* Cal. Const. art. X, § 3 (withholding

activities that facilitate water-related commerce, such as the building of wharves, docks and other structures and “ancillary or incidental uses” that directly promote trust uses. Non-permitted public trust uses “are those that are not trust use related, do not serve a public purpose, and can be located on non-waterfront property, such as residential and non-maritime related commercial and office uses.”¹¹

The Oakland Athletics’ Project under consideration is not compliant with the Public Trust. In addition to a privately-owned baseball stadium, the Project includes up to 4,000 residential units and approximately 2.27 million square feet of adjacent mixed-use development, including retail, commercial and office uses. Non-maritime related retail and office use and residential uses are generally understood to be incompatible with the Public Trust. *See City of Berkeley, fn. supra*, at 538; Cal. Attorney General Opinion 95-901 (1996)¹² (recognizing “long term residential uses which do not benefit the public at large” as inconsistent with Public Trust doctrine). As envisioned in the Bay Plan, housing is neither a water-oriented use nor a Public Trust use under the MPA. *Mein v. San Francisco Bay Conservation etc. Com.* (1990) 218 Cal.App.3d 727, 733-734. Generally, mixed-use developments containing elements that are not Public Trust-compliant should not be approved absent a connection to water-related activities that provide statewide public benefits. SLC Public Trust Policy at 9. Here, the Project as a whole would also interfere with traditional Trust uses at the Port such as water-based commerce and navigation.

Agenda Item 9: Public Hearing and Possible Vote on Issuing a Brief Descriptive Notice to Possibly Remove the Bay Plan and Seaport Plan Port Priority Use Area Designations from Howard Terminal, Bay Plan Amendment No. 2-19

The two proposed Amendments (No. 1-19 and 2-19, respectively), and the accompanying staff reports raise many of the same issues. They also appear to be inter-related (i.e., the Oakland Athletics’ proposal will be considered as part of Amendment No. 1-19). Accordingly, we incorporate by reference the discussion of Agenda Item No. 8 above. We also add that the Seaport Plan states BCDC and MTC should consider amending the Plan upon the request of a property owner, local government, or government agency. Seaport Plan at 45. The Oakland Athletics do not satisfy any of those categories and do not to our knowledge have an interest in the Port property.

Nonetheless, as to Agenda Item No. 9, the Commission stated its intent to hold a possible vote on the application from the Oakland Athletics to delete the port priority use area designation in the Bay Plan and the Seaport Plan from Howard Terminal in Oakland. As discussed above, removal of the port priority use would facilitate the proposal for a new major league baseball park and

from grant or sale all tidelands within two miles of any incorporated city, county or town); Pub. Res. Code § 7991 (withholding from sale tidelands between the ordinary high and low water mark).

¹¹ *See* Cal. State Lands Commission Public Trust Policy (“SLC Public Trust Policy”) (2001), available at: http://archives.slc.ca.gov/Meeting_Summaries/2001_Documents/09-17-01/Items/091701R88.pdf

¹² <https://oag.ca.gov/system/files/opinions/pdfs/95-901.pdf>

mixed-use development. The proposed Descriptive Notice states that the “proposed amendment would remove the port priority use area designation at the Howard Terminal as shown on Bay Plan Map 5. The change would reflect the removal of the designation from the terminal at the Port of Oakland.” Descriptive Notice at 1.¹³

We note that Figure 2 of the Notice, “Proposed Change to the Port of Oakland Priority Use Area,” Plan Map 5, fails to reflect water-related industry in the inner harbor including the location of the Schnitzer Steel facility. That could be a function of the scale of the map since the facility is elsewhere mentioned in the Plan as distinct from a generic analysis of Port uses. As the Bay Plan states that its policies and maps are “necessarily general in nature,” and the Commission is authorized to clarify, interpret, and apply them as necessary, there should be clarification that policies and maps – existing and subsequent to any proposed amendment – must maintain the water-related industry priority uses including for the Schnitzer Steel facility.

Agenda Item 10: Commission Consideration of a Contract with the Oakland Athletics for Staff to Conduct the Analysis Required for the Commission to Consider Removal of the Bay Plan and Seaport Plan Port Priority Use Area Designation from Howard Terminal

We understand that the Commission will consider authorizing the Executive Director to enter into a contract with the Oakland Athletics for payment of the full cost of work required for the Commission to process and act upon an amendment to the Bay Plan and the Seaport Plan. *See, e.g.*, 14 Cal. Code Regs. § 11008 (applicant payment of costs of processing of an amendment to a Commission Planning Document). However, removal of the Bay Plan and Seaport Plan priority use designation from Howard Terminal could unnecessarily foreclose port priority uses on the limited available port land in the Bay solely to accommodate the Oakland Athletics’ ballpark and mixed-use proposal that is speculative at this stage and prior to environmental review conducted by the City of Oakland.

The Project proposed by the Oakland Athletics would require a permit as a substantial change in use at Howard Terminal. § 66632; 14 Cal. Code Regs. § 10125(b) (a “substantial change in use” includes construction, alteration or other activity with a cost of \$250,000 or more, change in the general category of use of land, or substantial change in the intensity of use). Commission regulations provide that BCDC will not accept a major permit application under the MPA until a project has received all discretionary local land-use approvals. 14 Cal. Code Regs. § 10310(f)(1) (or “(2) for subdivisions or other land divisions requiring a Commission permit for which final local approval or disapproval has not been granted, a statement that the local government either favors the project, with or without conditions, or does not favor the project”). Section 66632(b) requires permit applications to “include measures to assure that the city or county which has jurisdiction over a project may consider and act on all matters regarding the project that involve a discretionary approval before the commission acts on an application.” Numerous approval actions will be need for this project by the Port and the City of Oakland, as well as other regulatory agencies, the outcome of which is unknown at this stage.

¹³ <http://www.bcdc.ca.gov/cm/2019/0117DescNoticeBPA2-19.pdf>

Although we understand the Oakland Athletics have not yet applied to BCDC for a permit, the contract and analysis proposed here comprise one part of the entire action proposed by the Athletics and should not circumvent the requirement for prior local land-use approval and associated planning and environmental review.

NOTICE REQUEST

This submission shall also serve as an official written request of Notice for any and all meetings upon which the public has access and/or noticing rights.

Respectfully submitted,

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